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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JEFFERY D. ARNETT, MATTHEW P. THOMAS,
and ALAN K. UKE

Appellants

Appeal 2008-5434
Application 09/689,001
Technology Center 3700

Decided: November 21, 2008

Before SALLY GARDNER LANE, SALLY C. MEDLEY, and JAMES T.
MOORE, *Administrative Patent Judges*.

LANE, *Administrative Patent Judge*.

DECISION ON APPEAL

I. STATEMENT OF THE CASE

The appeal, under 35 U.S.C. § 134, is from a Final Rejection of claims 6-9, 12, 26, and 29-31. Claims 1-5, 10¹, 11, 13-25, 27, and 28 have been cancelled (App. Br. 4). We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

The application was filed Oct. 12, 2000. The real party in interest is said to be Underwater Kinetics, Inc. (App. Br. 2).

The Examiner relied on

Name	Number	Date
Seitz	3,709,538	Jan. 9, 1973
Kushman	4,109,819	Aug. 29, 1978
Henne	4,838,586	Jun. 13, 1989
Munoz	4,861,078	Aug. 29, 1989

The Examiner rejected claims 6-9, 12, 26, and 29-31 under 35 U.S.C. § 103(a) over each of Seitz, Henne, Munoz, or Kushman. Appellants did not argue for the patentability of any of the claims separately. We review claim 6 as a representative claim. *See* Bd. R. 37(c)(1)(vii).

Appellants' claim 6 recites:

A latch system for a container, the container including a first section and a second section, the latch system comprising:
a latch pin mounted in the first section; and
a deflectable member mounted in a latch, with the latch pivotally coupled to the latch pin so that the deflectable member is positioned between the latch pin and a portion of the latch;
wherein the latch is structured to removably engage the second section, and the deflectable member is configured to absorb relative

¹ We note that while Appellant represented that claim 10 had been cancelled, it is indicated as "withdrawn" in the Amendment filed September 27, 2006, which is the last amendment of record.

compression movement between the first section and the second section.

(App. Br. 21).

II. ISSUE

Do any of Seitz, Henne, Munoz, or Kushman teach a “deflectable member” that is mounted within a latch and is “configured to absorb relative compression movement” between a first section and a second section of a container?

III. FINDINGS OF FACT AND ANALYSIS

The record supports the following findings of fact as well as any other findings of fact set forth in this opinion, by at least a preponderance of the evidence.

1. Figure 8 of Appellants’ specification is reproduced below.

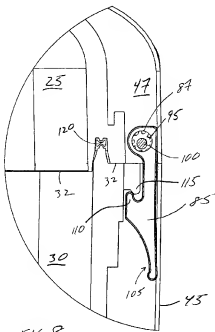


Figure 8 depicts a container with a first section 25, a second section 30, and a latch 85, wherein the latch includes a latch pin 100 and a bushing 95 located in a cylindrical cavity 87. (Spec. 7, l. 11, through 8, l. 3).

2. Appellants' specification explains that

[l]atch pin 100, which is also connected to first section 25 compresses bushing 95 as the top section 25 is forced against the bottom section 30. In contrast to conventional latch systems that are rigidly mounted, and that would release and allow the container 20 to open, the latch system of the present invention can absorb the load and keep the latch 85 securely engaged. This is because bushing 95 deflects, as shown in FIG. 8, allowing latch pin 100 to shift in the cylindrical aperture 87 of the latch 85.

(Spec. 7, l. 20, through 8, l. 3).

3. Appellants' specification does not provide a minimum amount of deflection that the bushings must undergo to absorb a compression.

Findings of Fact Related to Seitz

4. Seitz teaches a latch for a receptacle that includes a bore into which a rod is inserted, and bushings mounted onto the ends of the bore. (Seitz col. 2, ll. 46-49, and col. 3, l. 48).

5. Figure 4 of Seitz is reproduced below.

FIG. 4.

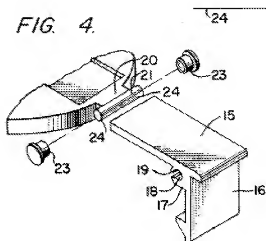


Figure 4 depicts that “[t]he latch mechanism is secured to the cover by sliding the L-shaped member 14 [comprising legs 15 and 16] by means of the bore 18 onto rod 21 with the connecting part of tongue 20 extending through slot 19” (Seitz col. 2, ll. 46-49), and that the “[b]ushings 23 having a cup configuration are secured to the projecting ends 24 of rod 21.” (*Id.* col. 2, ll. 52-54).

6. Figure 1 of Seitz is reproduced below.

FIG. 1

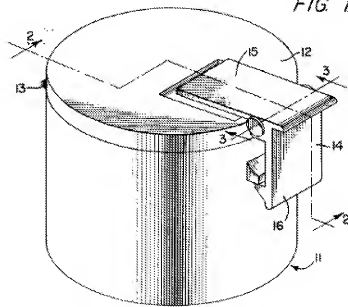


Figure 1 depicts “a perspective view of a receptacle and a closure thereon” (Seitz col. 2, ll. 11-14).

7. The brushings described in Seitz may be of a “thermoplastic material.” (Seitz col. 3, l. 41).

Principles of Law and Analysis Related to Seitz

Appellants claim a latch system that has a “deflectable member” to “absorb relative compression movement” between the latched parts of a container. Appellants’ specification provides that the “deflectable member” can be a “bushing.” (FF² 2). The Examiner asserts that bushing 23 described in Seitz is a “deflectable member.” (Ans. 4). Appellants argue that “bushing 23 of Seitz does not and cannot absorb any relative movement between the first and second section” (App. Br. 13), and that “[t]here is no teaching that the bushings ‘deflect’ in any manner and absorb any compression movement” (*Id.*).

We understand bushing 23 of Seitz to be positioned between rod 21, which is part of the top of the container, and bore 18, which is part of the bottom of the container. (FF 5). Thus, a compression movement between the top and bottom sections of the container in Seitz would be absorbed, at least in part, by bushing 23.

Appellants’ claims do not limit the amount of deflection the “deflectable member” must undergo in order to “absorb relative compression movement between the first section and the second section.” Appellants do not direct us to, and we do not find, portions of their specification that either quantify the amount of deflection required or provide lower limits on it.

² Finding of Fact.

Thus, under the broadest reasonable interpretation of Appellants' claim 6, any amount of deflection that would "absorb relative compression movement," even if minimal, is encompassed by the claim. *See In re American Academy of Sci. Tech Center*, 367 F.3d 1359, 1364 (Fed. Cir. 2004) ("During examination, 'claims ... are to be given their broadest reasonable interpretation consistent with the specification, and ... claim language should be read in light of the specification as it would be interpreted by one of ordinary skill in the art.'").

Appellants have not provided us with sufficient evidence to show that bushing 23 of Seitz would not "absorb relative compression movement" to some degree. In fact, Seitz teaches that bushing 23 can be made of "thermoplastic material" (FF 7), just as Appellants' dependent claim 29 provides a "deflectable member" made of "plastics and rubbers." (App. Br. 22). Thus, Appellants have not convinced us that Seitz does not teach a "deflectable member" that can "absorb relative compression movement between the first section and the second section."

Appellants also argue that "unlike the bushings of the embodiment of the present invention, the bushings 23 of Seitz include no deflectable ribs or any other feature to absorb any relative movement. Rather, the bushings 23 of Seitz are solid bushings for facilitating rotational movement of latch 15." (App. Br. 13-14). But, neither Appellants' claims nor the specification limit the "deflectable member" to having deflectable ribs or to "non-solid" bushings.

Appellants have not directed us to evidence that bushings of the shape and constitution described in Seitz would not absorb any relative movement.

“Argument of counsel cannot take the place of evidence lacking in the record.” *Meitzner v. Mindick*, 549 F.2d 775, 782 (CCPA 1977).

In addition, Appellants argue that “[r]ather than teaching or suggesting a bushing capable of absorbing compression movement, as illustrated in Figure 2 of Seitz . . . , Seitz discloses a ring 32 to bias the horizontal leg 15 upward.” (App. Br. 19). Whether or not the spring 32 in Seitz absorbs any compression movement, Appellants have not shown that bushing 23 does not absorb relative compression movement between the first section and the second section, as claimed.

Seitz teaches each of the elements claimed by Appellants in claim 6 and so anticipates the claimed latch system. *See Atofina v. Great Lakes Chem. Corp.*, 441 F.3d 991, 999 (Fed. Cir. 2006) (“Anticipation requires a showing that each limitation of a claim is found in a single reference, either expressly or inherently.”). “It is well settled that ‘anticipation is the epitome of obviousness.’” *McDaniel*, 293 F.3d at 1385. Thus, Appellants have not convinced us that the Examiner erred in rejecting claim 6 under 35 U.S.C. § 103(a) over Seitz.

Facts Related to Henne and Munoz

8. Henne and Munoz teach latches for oven doors. (Henne col. 1, l. 6, Munoz col. 1, l. 6-7).
9. Figure 6 of Henne is reproduced below.

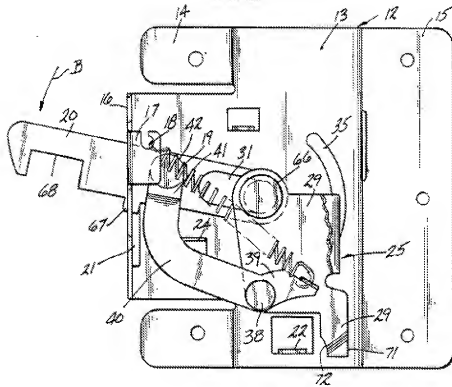


FIG-6

Figure 6 depicts “[l]atch arm 20[which] has an elongated slot 31 which receives therein a bushing 66 on pin 30 [not depicted in Figure 6].” (Henne col. 4, ll. 7-8).

10. Henne explains that

[w]hen the cut-out 68 in latching arm 20 engages a strike plate on the oven door (not shown) motion of the latch arm will be halted. Further rotation of handle 31 will then cause latch arm 20 to move on bushing 66 in elongated slot 31 inwardly and the latch 20 will pull the oven door in tightly to close the opening to the oven.

(Henne col. 4, ll. 16-22).

11. Figure 4 of Munoz depicts the same elements as Figure 6 of Henne, with essentially the same description.³ (Munoz col. 3, ll. 52-58).

Principles of Law and Analysis Relating to Henne and Munoz

Henne and Munoz teach a latch that includes a pin [30] and a bushing 66. (FFs 9 and 11). The bushing 66 receives latch arm 20 and allows it to move in elongated slot 31. (FFs 10 and 11). The Examiner asserted that “the deflectable member [bushing 66, according to the Examiner] is configured to absorb relative compression movement or movement of the lid toward the oven body which will move the latch (20) with respect to the oven body and the pin 30 which are relatively stationary.” (Ans. 5).

Appellants argue that “[t]he bushings 66 of Henne and Munoz do not and cannot absorb any relative movement between a first and second section. The bushings disclosed in Henne and Munoz merely function to retain another component in a pre-determined position and facilitate rotational movement.” (App. Br. 15). Appellants cite to a description in Henne and Munoz of latch arm 20 moving on bushing 66. (See FF 10). Even though Henne and Munoz teach movement of the latch arm on the bushing, Appellants have not explained why this movement would not also allow bushing 66 to absorb some of the compression movement.

Appellants also argued that “[u]nlike a container, an oven door does not require transporting and is unlikely to experience the problems addressed by the present invention.” (App. Br. 14). If the latch described in Henne and Munoz has the same structures as claimed, the claimed latch is not patentable, whether or not it allows for a different function. *See In re*

³ In Munoz, the handle is designated 32, instead of 31.

Benner, 174 F.2d 938, 942 (CCPA 1949) (“no provision has been made in the patent statutes for granting a patent upon an old product based solely upon discovery of a new use for such product”).

In addition, Appellants argue that “Henne and Munoz include no deflectable ribs or any other feature to absorb any relative movement, but are, instead, solid bushings.” (App. Br. 15). For the reasons given above, in regard to Appellants’ similar argument against Seitz, we do not find this argument persuasive.

Appellants have not persuaded us that the Examiner erred in rejecting claim 6 under 35 U.S.C. § 103(a) over either Henne or Munoz.

Facts Related to Kushman

12. Kushman relates to vents for containers such as silos (Kushman col. 1, l. 4), wherein the vents include clamps for holding roof panels of the silo in place (*id.* col. 4, ll. 9-13).

13. Figure 4 of Kushman is reproduced below.

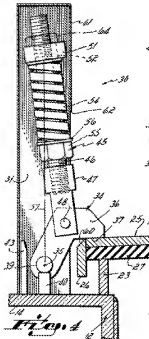


Figure 4 depicts

[latch member 34, which] is roughly L-shaped, having a projecting arm portion 36 which presents a latch surface or bearing surface 37 that in use is engaged with and bears downwardly on the upper surface 25 of roof panel 20. Latch member 34 is pivoted for rotation about axis 35 on a shaft 39 which at one end is secured to bracket 31 and at the opposite end is supported on a leg 40 secured to the roof framework. A bearing or bushing 41 may be provided to take the relative rotation between latch member 34 and axle 39 (see FIG. 7).

(Kushman col. 4, ll. 42-52).

14. Figure 7 of Kushman is reproduced below.

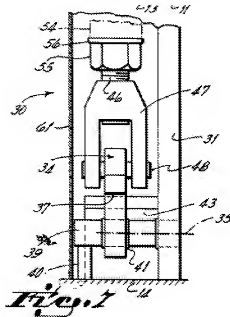


Figure 7 depicts axle 39 and bushing 41. (Kushman col. 4, ll. 50-52).

Principles of Law and Analysis Relating to Kushman

The Examiner asserts that “the deflectable member [considered by the Examiner to be bushing 41] is configured to absorb relative compression movement or movement of the roof downwardly which will move the latch

downwardly with respect to the vessel body and the latch pin (axle 39).”
Ans. 6).

Appellants argue that “the bushing 41 of Kushman does not and cannot absorb any relative movement. The bushing 41 of Kushman merely facilitates rotational movement between the latch arm 20 and the axle 39. (App. Br. 16). Appellants cite to the portion of Kushman that explains that “bushing 41 may be provided to take the relative rotation between latch member 34 and axle 39” (FF 13). Even though Kushman teaches that the bushing undergoes rotational movement, Appellants have not explained why this movement would not also allow bushing 66 to absorb some of the compression movement.

Appellants also argue that “vent structures are unlikely to experience the problems associated with portable containers” (App. Br. 15), and that “Kushman includes no feature, such as the deflectable ribs of the embodiment of the invention illustrated in Figure 8 of the present application, to absorb any relative movement” (App. Br. 16). For the same reasons provided above, in regard to Appellants’ arguments against Seitz, Henne and Munoz, we do not find these arguments convincing.

Appellants have not convinced us that the Examiner erred in rejecting claim 6 under 35 U.S.C. §103(a) over Kushman.

IV. CONCLUSIONS OF LAW

Seitz, Henne, Munoz, and Kushman teach a bushing that is a “deflectable member” “configured to absorb relative compression movement” between a first section and a second section of a container as claimed.

V. ORDER

Upon consideration of the record and for the reasons given,
the Examiner's rejection of claims 6-9, 12, 26, and 29-31 under 35
U.S.C. § 103(a) over Seitz is AFFIRMED;

the Examiner's rejection of claims 6-9, 12, 26, and 29-31 under 35
U.S.C. § 103(a) over Henne is AFFIRMED;

the Examiner's rejection of claims 6-9, 12, 26, and 29-31 under 35
U.S.C. § 103(a) over Munoz is AFFIRMED; and

the Examiner's rejection of claims 6-9, 12, 26, and 29-31 under 35
U.S.C. § 103(a) over Kushman is AFFIRMED.

No time period for taking any subsequent action in connection with
this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

MAT

Biotechnology Law Group
c/o Portfolioip
P.O. Box 52050
Minneapolis MN 55402